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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

* * *

NO. 36, ORIGINAL

* * *

THE STATE OF TEXAS,

Plaintiff

V.

THE STATE OF LOUISIANA,

Defendant

* * *

ACCEPTANCE OF THE STATE OF TEXAS TO THE REPORT OF THE SPECIAL MASTER, WITH TWO EXCEPTIONS

* * *

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May 1975

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ACCEPTANCE OF THE STATE OF TEXAS TO THE REPORT OF THE SPECIAL MASTER WITH TWO EXCEPTIONS

* * *

The Report of the Special Master, Judge Robert Van Pelt, was filed in this Original action on April 14, 1975. The parties were given 45 days within which to file their exceptions, if any, to the Report. The State of Texas, Plaintiff, accepts and urges approval of the Report, subject to the two exceptions hereinafter stated.

EXCEPTIONS

I.

THE SPECIAL MASTER ERRED IN HOLDING THAT AFTER OVER ONE HUNDRED YEARS OF HAVING ABUTTING AREAS OF OFFSHORE JURISDICTION, TEXAS AND LOUISIANA HAVE NEVER HAD A GULFWARD BOUNDARY BETWEEN THEIR AREAS OF JURISDICTION.

II.

THE SPECIAL MASTER ERRED IN HOLDING THAT THE LATERAL OFFSHORE BOUNDARY TO BE CONSTRUCTED BETWEEN THE STATES OF TEXAS AND LOUISIANA IS TO BE DETERMINED SOLELY BY AVULSIVE, MAN-MADE ADDITIONS TO THE SHORELINE.

STATEMENT

The Master herein erred in his determination of the two principle legal issues to be decided by him. First, he held that after over 100 years of having abutting areas of offshore jurisdiction, Texas and Louisiana have never had a Gulfward boundary between their areas of jurisdiction. Second, and compounding his first error, he held that the lateral boundary to be constructed is to be determined

solely by avulsive, manmade additions to the shoreline--the jetties.

The right answer, Texas believes, is the converse of the Master's. First, whether precisely delimited or not, the very existence of two abutting areas of offshore jurisdiction implies a boundary between the two, dating to the creation of the offshore areas of jurisdiction. One is and has been that of Texas; the other is and has been that of Louisiana. Texas and Louisiana have not been tenants in common all these generations.

Second, even if one ignores the legal soundness and compelling logic of a long pre-existing lateral boundary, Texas believes that proper application of today's legal doctrine to the process of fixing the boundary anew leads inevitably to the choice of a median line based on the natural shoreline of Texas and Louisiana, before the United States Corps of Engineers built its jetties.[1]

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[1]The Special Master purported to base his conclusion on the stated basis that under the law of prescription and acquiescense, Texas has lost its right to contend for any other line. The Master does not favor the Court or the parties hereto with any citation, authorities for this proposition (which was not seriously relied upon by any party hereto, and never urged at all by the United States), nor does he give any illuminating discussion about what facts or circumstances he sees as dictating a conclusion on that basis. Since it is the belief of Texas that the doctrine of prescription and acquiescense simply cannot be used factually or legally to determine the

With regard to the first point, it seems fairly clear that if one accepts it as a correct premise, little is left to legitimate debate. As will be developed more fully hereinafter, the law of the mid-1800's clearly endorsed (in the absence of treaty or specific legislation) the equity of the "middle" line --the lineal ancester of today's more precise "median" line (see Texas Exhibit "DDD" and Special Master's Exhibit). Under our law, that boundary simply cannot be changed by avulsion, and the United States Corps of Engineers building of the jetties is apparently conceded by all parties to be avulsive in nature. (Nor can one reach a contrary result by the indirection of claiming that while the boundary cannot be moved by avulsion, the "mouth of the river"--a landmark spelled out in the Texas Boundary Act of 1836 (1 Laws, Republic of Texas, 133)--can be so moved, thus reaching the desired--but wrong--result. The United States largely aban-

Footnote 1 cont.

rights of the parties hereto, we will defer our discussion of that seemingly inclusive and irrelevant aspect of the case until the close of our remarks herein. It seems apparent from the content of the Master's Report itself that even the Master was not totally comfortable in purporting to rely on prescription and acquiescense, since he devoted not more than one-fourth of a page in his 47 page Report to that theory, while spending some 14 pages in refuting what we believe to be Texas' valid contentions with regard to the lateral boundary between Texas and Louisiana.

doned this contention in its Post Trial Brief, and the Master circumspectly avoided holding that the "mouth of the river" had been transported seaward three miles by the Corps of Engineers.)

It is worthy of long note that a median line based on the natural shoreline--either historic or present --is a very markedly different line than one drawn down the middle of the jetties and extended seaward. This is, of course, hardly surprising, since the object of the Corps of Engineers was concededly not to attempt an equitable division of offshore lands, but rather, to build a structure the design of which was dictated by the strength and direction of prevailing currents and wind.

Why, then, even if one erroneously rejected the seemingly clear concept of a long-existing boundary would one reach the conclusion that application of today's law to a presumably open question would result in a conclusion that the jetties determine the lateral boundary? Texas respectfully submits that the Master has succumbed to the temptation to apply the "eyeball" method of delimitation rather than the precise technical commands of the law. The Master appears to have been dissuaded from a correct result, by the belief that a jetty line is a more "equitable" line than a precisely determined median line:

> "The use of Article XII [resulting, by the Master's logic in a jetty line] also produces an equitable result in your Special Master's opinion, while the lines suggested by Texas and Louisiana do not

produce an equitable result.

> "Your Special Master believes the position of the United States to be the most equitable. . . . " (Emphasis added. Special Master's Report, page 29.)

And regarding the median line based on present shorelines (not contended for by Texas because of its influence by the avulsive addition of the jetties):

> "It also produces an inequitable result." (Emphasis added, Special Master's Report, page 40.)

and later:

> "A median line using the modern coastline without the jetties produces the most easterly line of any. This is graphically shown by and was a reason for the Special Master's Exhibit. It seems inequitable on its face and is not offered by Texas as its proposed boundary line." (Emphasis added. Special Master's Report, page 42.)

and

> "To comply with the Convention and to do equity both jetties must be included as a part of the baseline." (Emphasis added. Special Master's Report, page 45.)

What is the "equity to be sought in this dispute?

It is a fair and equal division of the offshore lands of Texas and Louisiana. How then, one might well ask, can one fail to do equity if one divides that territory by a precise drafting method having as its very design and purpose the construction of a line which at all its points is precisely equidistant from the nearest points on each shoreline? If there were no jetties, presumably none would disagree with the equity of a median line based on the natural shoreline.

What, then, is it about the jetties that compels departure from what would otherwise be concededly a proper result?

Can it be the fact that such a median line would cross the east jetty? There seems nothing compelling about that fact--the jetties were designed, built, and are maintained by the United States. Their ownership is specifically retained in the United States by Section 5(c) of the Submerged Lands Act. It seems highly doubtful that this circumstance would have troubled the international law commission (Special Master's Report, page 43)which was concerned with the troublesome practical problem of cutting of peninsulae of land under the complete sovereignty of other nations (and which commission would equally, if not more troubled by this disrupting effect of extremely long harborwork). U. N. General Assembly, Official Records 11th Session, Supp. No. 9, 16 (1956); I Yearbook of International Law Commission 1956, 193.

Can it be that the fact that the jetties form a "navigable channel" compel their choice as the

determinates of the lateral boundary? (See Special Master's Report, page 43) This might well be a relevant factor if Texas and Louisiana were independent nations; but neither is. The United States --not Texas or Louisiana--has jurisdiction to control navigation through the jetties. Delimitation of the lateral boundary between the two states cannot effect navigation regulated by the United States.

Can it be the fact that Louisiana is allowed to measure the seaward limit of her offshore lands from the end of the east jetty? This seems hardly persuasive--Louisiana would still so measure the seaward extent of her submerged lands, whether the jetties or the median line based on natural shorelines is chosen for the lateral boundary. The law which gives Louisiana the right to measure seaward three miles from the jetty tip gives her that right only as that area may be defined laterally in this case. If it were otherwise, there would be no necessity for this litigation.

Can it be the fact that the jetties form easily referred to physical landmarks for boundary identification? While this may have a simplistic appeal, it has no basis in law, domestic or international.

Can it be that the makeup of the natural shoreline is such that their irregularity produces a median line not truly "median" and thereby fails to live up to its warranty of equity? Clearly this is not the answer--all of the experts--Hodgson, Young, Alexander, and Wilson, agree that the coastlines, excluding the jetties were "regular" within the meaning

of the Convention. But, Texas submits, this was the error fallen into by the Master--the very error he chided Louisiana for when it contended the Texas line was wrong because it ran "beneath" Louisiana. (Special Master's Report, page 35.) The Master correctly takes issue with Louisiana because her position rests on the assumption that only a due south line is proper. Texas believes it correctly takes issue with the Master's position because he assumes that only the jetty line is "equitable".

If no other sound reason can be found to define the lateral boundary solely by use of the jetties, then is there some compelling legal reason dictated by the black letter of domestic or international law, that compels a departure from equity and a withdrawal to the jetties? Texas submits there is not, and that in fact literal application (by analogy or otherwise) of today's international or domestic law leads inexorably to the conclusion that the median line, based upon an historic shoreline, is the proper, lateral boundary.

I.

THE SPECIAL MASTER ERRED IN HOLDING THAT AFTER OVER ONE HUNDRED YEARS OF HAVING ABUTTING AREAS OF OFFSHORE JURISDICTION, TEXAS AND LOUISIANA HAVE NEVER HAD A GULFWARD BOUNDARY BETWEEN THEIR AREAS OF JURISDICTION.

In determining the proper lateral offshore

boundary between Texas and Louisiana, the Special Master has framed the issue thus:

> "The first question to be determined is whether or not the Geneva Convention on Terrirorial Sea and Continental Zone applies to this boundary." (Special Master's Report, page 21.)

Texas submits that this is not the first question to be resolved. Indeed it may not even be relevant to this case. Following the process consistently utilized by this Court, the first question is what do the instruments of annexation reveal concerning the location of the lateral boundary of the two states at the time of admission? If they do not reveal the precise location of the boundary, the next question is where would the boundary be precisely located by virtue of the applicable law at the time of annexation? And finally, has any circumstance or event occurred which would have the effect of legally altering the boundary since the time of annexation? It is only in relation to this last inquiry that the relevance, if any, of the Geneva Convention to this controversy should be considered. The Master deals with these issues only in the context of Article 12 of the Convention, insofar as that article allows exceptions of historic title or special circumstance to justify determination of a lateral boundary by a method other than a median line. (Page 35, Special Master's Report.) Texas submits this procedure and the Master's conclusions pursuant thereto are erroneous. Therefore, we will discuss the issues from the perspective which we believe this Court has previously viewed such controversies.

A. An Historic Lateral Boundary Between Texas and Louisiana Existed Prior to Precise Delimitation.

The Special Master's conclusion that no boundary of any nature existed or now exists between Texas and Louisiana is based on the premise that the 1836 Boundary Act of the Republic of Texas "simply does not describe or delimit any lateral boundary line from the mouth of the Sabine gulfward. No meridian is chosen, no angle of departure from the coast is referred to, nor is any point in the Gulf three leagues from land specified." (Special Master's Report, page 37.) Texas has not and does not now assert that the operative historical documents precisely plotted the lateral boundary line. But to leap to the conclusion that since the documents do not precisely locate the boundary they are irrelevant and that no boundary existed in absence of a precisely staked out line is inconsistent with the testimony at the trial of this cause, international law, and the law of this country.

1. The Historic Lateral Boundary Between Texas and Louisiana.

Principles applicable to disputes between states of the United States over their mutual boundaries are well established. The boundaries of a state are established by an act of Congress when the state is admitted as a member of the Union, and the boundary continues as it existed at the time and cannot be changed without the consent of the state. Indiana v. Kentucky, 136 U.S. 479 (1889). Nebraska v. Iowa, 143 U.S. 359 (1892); Washington v. Oregon,

211 U.S. 127 (1908). Where a river forms a boundary between states, the boundary follows the varying course of the river if such variances occur through the natural and gradual process of erosion and accretion. However, if a change in a river results from avulsion, caused by either natural or artificial means, no change in boundary results. Nebraska v. Iowa, supra; Washington v. Oregon, supra; Arkansas v. Tennessee, 246 U.S. 158, (1918); Minnesota v. Wisconsin, 252 U.S 273 (1920); Durfee v. Duke, 375 U.S. 106 (1963).

Judicial determination of the precise limits of a long existing although not precisely staked out lateral boundary should be made on the basis of the operative facts and law as of the date of creation of the boundary. The United States Supreme Court adopted this principle in Wisconsin v. Michigan, 295 U.S. 455, 461 (1935).

> "As it is impossible to identify any channel in the bay as that indicated by the acts referred to, the intention of Congress must be otherwise ascertained."

The Court did not adopt the principle indicated by the Special Master that international law is the primary source by which courts of this country are to be guided in determining boundary disputes between states. (Special Master's Report, page 22.)[2] See

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[2]Similarly, the use of international law by this court in determining a portion of the boundary between two states in New Jersey v. Delaware, 291

also New Mexico v. Texas, 275 U.S. 279 (1927); Minnesota v. Wisconsin, supra.

The rights of the parties become fixed at the time of annexation as surely as if the boundary had been then fixed by metes and bounds.[3] Applying these basic principles to the case at bar initially requires an examination of the documents and circumstances defining the boundaries of Texas at the time of her admission to the Union.

As a Republic, Texas in 1836 asserted a three league territorial sea, bounded laterally by lines beginning at the mouths of the Sabine and Rio Grande rivers:

Footnote 2 cont.

U.S. 361 (1934), also relied on by the Master was required because none of the documents affecting title to the area in dispute reflected the intent of ownership, therefore, international law was applied. Significantly the court traced the development of the relevant principle, the Thalweg, from its position in modern law back to its "germinal existence" in 1783, justifying its application to the boundary dispute in question. 291 U.S. at 383, 384.

[3] Lambert's Point Co, v. Norfolk &W. Ry. Co., 74 S.E. 156, 157 (Va. 1912). In this case a lateral boundary to mid-river between two riparian owners held to have existed "in contemplation of law" even though never "judicially ascertained" nor privately agreed, and thus not subject to change by artificial improvements by one owner.

> "That from and after the passage of this act, the civil and political jurisdiction of this Republic be, and is hereby declared to extend to the following boundaries, to-wit: Beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, then due north to the 42nd° of N. Latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning." (1 Laws, Republic of Texas, 133.) (Emphasis added.)

The Congress of the United States recognized that territorial sea by its Annexation Resolution in 1845:

> "That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas. . .said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments. . ." 5 Stat. 797. (Emphasis added.)

In the Annexation Resolution, the Congress accepted all "the territory properly included within and rightfully belonging to the Republic of Texas." The phrases "properly included" and "rightfully be-

longing" were placed in the Resolution because of Congressional uncertainty of the Republic of Texas' disputed western boundary with Spain and Mexico. U. S. v. Louisiana, et al., 363 U.S. 1, 40-41 (1960). A solution to the uncertainty of the western landed boundary, as well as the seaward boundary was anticipated through "the adjustment by this government of all questions of boundary that may arise with other governments." Legislative history reveals that no uncertainty or lack of consideration existed as to the precise location of the eastern landward boundary between the United States and the Republic of Texas/State of Texas. (See Texas Post-Trial Brief, pages 11-13.) The landward boundary between the two nations on the Sabine River was from its mouth on the Gulf of Mexico in the Sea to Logan's Ferry at 31° 58' 24" North Latitude.[4] The location of such line coincided with that part of the boundary established by the 1836 Texas Boundary Act, supra.[5]

No other discussion or documents referred to the eastern boundary until 1848 when Congress authorized the State of Texas to extend her eastern boundary to include one-half of the Sabine River from its mouth to the thirty-second degree of north latitude,[6] (an area previously reserved to the United

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[4]S. Doc. No. 199, 27th Cong., 2d Sess. 59.

[5]"beginning at the mouth of the Sabine River . . . thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: . . ."

[6]9 Stat. 245.

States). This congressionally authorized eastward extension necessarily extended the seaward lateral boundary eastward, by moving the landward departure point from the west bank to the geographic middle of the river mouth.

That Congress and the State of Texas as well as the State of Louisiana intended the offshore lateral boundary of the two states to commence at the mouth of the Sabine River in 1812, 1845, and 1848 can easily be ascertained through the historical documents relating to the states respective boundaries and annexation resolutions.

The 1812 Act of Congress admitting Louisiana to the Union stated:

> "Beginning at the mouth of the River Sabine; thence, by a line to be drawn along the middle of said river, . . . thence, bounded by said Gulf, to the place of beginning, . . . " (2 Stat. 701, 702)

The Republic of Texas 1836 Boundary Act stated:

> "Beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from land, . . ." (1 Laws, Republic of Texas, 133.)

The Congressional Annexation Resolution of 1845 admitting Texas into the Union states:

"That Congress doth consent that the

> territory properly included within and rightfully belonging to the Republic of Texas, may be erected into a new State . . . " (5 Stat. 797)

And finally, the 1848 congressional act consenting to the extension of the eastern boundary of Texas stated:

> ". . . also one-half of the Sabine River, from its mouth . . . " (9 Stat. 245.)

The Supreme Court has decided that the western half of the Sabine River was never a part of Louisiana. The United States thus is the only party ever having had even a potential claim to the offshore "sliver". The United States has conceded Texas' historic ownership of this area, dating to 1848, by stipulation entered into between Texas and the United States pursuant to United States v. Louisiana, et al., 394 U.S. 1 (1969). Footnote two contained at page two states:

> "A Stipulation filed with the court identifies Texas' 1845/1849 coastline and also its gulfward boundary three leagues distant. An Act of November 24, 1894, Laws, 3d Tex. Leg. C.2, P.4, adopted with the consent of Congress, Act of July 5, 1848, 9 Stat. 245, extended Texas' boundary opposite Sabine Pass. The United States has accepted Texas' three league boundary opposite the western half of the Sabine Pass, not as a boundary as it existed when the State came into the Union in

> 1845, but one approved by Congress before passage of the Submerged Lands Act, and as such equally entitled to recognition under Section 2(b). The line identified in the Stipulation as the line to be recognized as Texas' historic offshore boundary includes the 1849 extension, the United States reserves the effectiveness of that extension as against other claims, for example, any that might be asserted by Louisiana." (Emphasis added.)

Thus, Texas has an historic boundary in the Gulf of Mexico for the purpose of the lateral offshore boundary between Texas and Louisiana. This boundary was established in 1845 and modified in 1848. It extends from the middle of the mouth of the Sabine River as it existed in 1845/48 to a point three marine leagues seaward.

2. Existence of a Boundary Though Not Precisely Delimited.

The existence of an historic boundary, though not precisely delimited has been recognized by this Court and by Congress on many occasions. The unplotted location of a three league seaward boundary for the State of Texas was affirmed by this Court. U.S. v. Louisiana, 363 U.S. 1 (1960).

Further recognition of the existence of state lateral boundaries is seen in the contentions of the United States and Decrees entered pursuant to the first California, Texas, and Louisiana tidelands cases. In each instance, the States were enjoined

from certain actions in the territorial sea, limited laterally by the boundaries of the States.[7]

Further, Sec. 1311(a), Submerged Lands Act, supra, states in part:

> "It is determined and declared to be in the public interest that title to and ownership of the land beneath navigable waters within the boundaries of the respective States . . . are . . . recognized, confirmed, established and vested in and assigned to the respective States . . ." (Emphasis added.)

Thus, the general notion of State offshore and lateral unplotted boundaries, pre-existing the Act, was clearly confirmed by Congress. The Special Master, however, attempts to justify his premise that boundaries do not exist between states unless or until precisely written down in cartographer's terms by concluding that in United States v. Louisiana, 363 U.S. 1 (1960), "most if not all of the members of the Supreme Court, whether in concurrence or in dissent, recognized that lateral boundaries were not being determined when Texas was admitted into the Union." (Special Master's Report, page 39.) Texas submits that this case stands for precisely the opposite proposition, the position contended for by Texas. In attempting to

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[7] U.S. v. Texas, 339 U.S. 707 (1950) at page 709; U.S. v. Texas, 340 U.S. 900, 901 (1950); U.S. v. California, 332 U.S. 804, 805 (1947); U.S. v. Louisiana, 304 U.S. 900 (1950).

determine the seaward boundary of the State of Texas "as it existed at the time such state became a member of the Union,"[8] for purposes of the Submerged Lands Act, the Supreme Court held that although the Annexation Resolution intentionally contained no specific land or sea boundaries, Congress clearly anticipated that the boundaries set out in the Texas Boundary Act would be pressed against other nations and further that the three league boundary asserted in the Boundary Act was finally obtained pursuant to the Annexation Resolution through the Treaty of Guadalupe Hidalgo in 1848. 363 U.S. at 47-64. The fact that the location of the three league boundary had never been precisely mapped out, in no way kept the Court from finding the existence in 1845 of a boundary three leagues from the Texas shore. As succinctly stated by Mr. Justice Black in the paragraph following that relied on by the Special Master:[9]

> "Moreover, the Submerged Lands Act prescribed no standards for determining a strictly 'legal' boundary according to the conveyancer's art. There are, of course, no markers out in the Gulf of Mexico to show where the boundaries were when the states were admitted. Since some were admitted anywhere from 140 to 150 years ago, there are no living witnesses to testify where their

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[8] Submerged Lands Act, Section 2(a)(2).

[9] Special Master's Report, page 38.

> boundaries were at that time. But despite these difficulties, it is our duty to give effect to the congressional act as best we can. It is therefore my view that since we cannot look to legalistic tests of title, we must look to the claims, understandings, expectations and uses of the states throughout their history. This is because of the congressional expressions, stated time and time again that the act's purpose was to restore to the states what Congress deemed to have been their historic rights and purposes." 363 U.S. at page 90 (Emphasis added).

We agree with the statement of Mr. Justice Black and submit that his position is entirely consistent with the long standing approach of the Supreme Court in settling boundary disputes between states. If no boundary existed prior to the precise delimitation by the Court at the termination of the litigation, the Court would have no reason to examine historic documents concerning a state's boundary or to be bound by them. Wisconsin v. Michigan, supra; New Mexico v. Texas, supra; Minnesota v. Wisconsin, supra.

Nor was the long existence of a lateral boundary between Texas and Louisiana seriously contested at trial. Although not mentioned by the Special Master in his report, Dr. Hodgson, the Geographer of the United States Department of State, has acknowledged that a lateral boundary necessarily exists between two states having offshore jurisdictions, even though not precisely delimited, as in the

example of the Alaska-Canada offshore interface, a situation where neither country has by unilateral act attempted to establish a lateral offshore boundary. Nor have the two nations established a boundary by agreement. In such a vacuum, the witness for the United States testified that a lateral offshore boundary does exist nevertheless. (Tr., page 760.) Richard Young, law associate of Manley O. Hudson to 1956, member of the State Department Advisory Committee on the Law of the Sea, the Executive Board of the Law of the Sea Institute of the University of Rhode Island, (See Tx. Exh. "MMM", Tr., pages 939-946) described such a boundary as "inchoate" (Tr., pages 986, 989, 1078, 1079). Aaron Shalowitz, while employed by the United States Coast and Geodetic Survey, acknowledged the existence of such an "inchoate" lateral boundary between Texas and Louisiana in the form of a median line based upon the historic shorelines. (Tr., pages 656-696; Tx. Exh. "YYY".)

The concept of a boundary existing but not yet precisely laid down is by no means unknown to international law. The principle was recognized in the following terms by the International Court of Justice in the North Sea Continental Shelf Cases:

> "The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in vari-

> ous places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (Monastery of Saint Nacum, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9, at p. 10).[10]

In summary, the Master erred in disregarding the operative language of the relevant historical documents and in holding that no lateral offshore boundary exists or has existed between Texas and Louisiana.

Texas and Louisiana have had abutting areas of offshore jurisdiction with a boundary between them beginning at the mouth of the Sabine River and extending gulfward dating to the creation of the offshore areas of jurisdiction even though not precisely delimited.

In the absence of clear statutory language, and in the absence of illuminating legislative history, we must determine, by reference to standards of domestic and international law extant in 1845/48, how the Congress would have intended that the eastern boundary of Texas would be extended gulfward for three marine leagues from the mouth of the Sabine River.[11]

B. The Concept of Equitable Delimitation, Best Achieved by the Median Line, was the Most

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[10] [1969] I.C.J. Reports 3, at 32.

[11] See discussion, pages 24 to 29 , infra.

Accepted Method of Delimitation of Lateral Boundaries in 1845/49.

Had Congress in 1845 focused on the question of Texas' lateral offshore boundaries it would have selected the middle line as the most acceptable method of delimiting those boundaries.

Neither the United States nor Louisiana seriously disputed this contention; therefore, we will not burden this brief with a lengthy discussion but will limit the review to the most important points. We refer the Court to Pages 17-27 of Texas' Post-Trial Brief to the Special Master for a complete discussion of this point.

The middle line method of water boundaries was recognized as early as the Thirteenth Century during the reign of Edward II.[12]

In the Seventeenth Century, by treaties of 1658 and 1661, Sweden and Norway attempted to define a maritime boundary between their respective territories in the waters of the fjord leading to the present city of Oslo. More than two centuries later, the line in question became the subject of dispute which was submitted for decision to an arbitral tribunal in the so-called Grisbadarna Case.[13] The

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[12]See Fulton, The Sovereignty of the Sea, 542, 543 (1911).

[13]Scott, Hague Court Reports, 121-140 (1916).

Tribunal was asked to interpret 1658 and 1661 treaties between Sweden and Norway defining a maritime boundary between their respective territories.

In its award, the Tribunal held 1658 and 1661 were the critical dates for determining the parties' rights, even though the original treaty line was incomplete and had to be substantially lengthened. For this reason, it denied to Norway the use of certain reefs as basepoints which had not emerged from the water in 1661.

This decision is particularly notable for its recognition of the middle line principle and for international recognition that a boundary should be delimited according to the methods of boundary delimitation accepted at the time of the creation of the boundary, and applied to the physical circumstances then existing. The subsequent emergence of reefs off the coast of Norway was rejected as affecting the boundary. This principle has been adopted by the United States Supreme Court, see pages to 13, supra, and pages 43 to 46, infra. (Wisconsin v. Michigan, supra.)

By the first half of the Nineteenth Century the middle line theory became the only concept generally accepted for use in the United States.[14] In the Treaty between the United States and Great Britain of June 15, 1846, as regards the Juan de Fuca Straits between the U. S. and Canada the "middle" line was agreed to be the boundary through the

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[14] See Treaty of 2 September 1783 between the United States and Great Britain, Article II.

straits. These treaties clearly represent recognition and acceptance by the United States of the median line principle as the proper method of boundary delimitation, a recognition that has continued to be present.[15]

With regard to state boundaries, the "middle" line was the basis of the New York-New Jersey compact of 1833,[16] which was ratified by Congress in 1834,[17] thus further indicating the recognition by Congress at that time of the validity of the middle line principle. The agreement provided in pertinent part as follows:

> "ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of certained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and

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[15] Yearbook of ILC (1953),Vol. II, p. 89; Boggs, International Boundaries, Columbia University Press, New York, p. 187, Fig. 24, (1940).

[16] N.J.S.A. 5552: 28-17 to 28-22 (1955); N.Y. State Law, Art. 2, Section 7 (McKinney 1952).

[17] 4 Stat. 708 (1834).

> New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned." (Emphasis added)

Also, in Wisconsin v. Michigan, supra, the Supreme Court looked to international and domestic law applicable in 1836, the year the Enabling legislation was passed creating the Wisconsin Territory and annexing Michigan as a state, to determine a dispute over the boundary through Green Bay. In deciding the case, the Court first determined that Congress in 1836, intended Michigan and Wisconsin to "have equality of right and opportunity in respect of those waters, including navigation, fishing and other uses."[18]

The Court then concluded that the best method of assuring "equality of right and opportunity" is to equally divide the area.

> "On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these States. The rule that the States stand on an equal level or plane under our constitutional system (Wyoming v. Colorado, 259 U.S. 419, 465, 470, 42 S.Ct. 552, 66 L.Ed. 999) makes in favor of that construction of the boundary pro-

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[18] 295 U.S. at 462.

> visions under consideration." 295 U.S. at 462 (emphasis added).

Thus, it is evident that by 1845, the middle line concept was the accepted theory of water boundary delimitation. As aptly summarized by Mr. Young when asked the prevalent principles in 1845/1849:

> ". . .I would say that it was well established by the 1840's that in general a boundary should be drawn in accordance with the legal principles and the physical facts existing on the effective date of the instrument establishing the boundary.
>
> "Second, by the 1840's, I think there were two principles well developed in international law for determining water boundaries. There was the concept of the middle line and the concept of the thalweg or navigable channel. The thalweg found its use principally in situations involving navigable rivers where equality of access for navigation was important. The middle line concept had developed in relation to lakes and to narrow seas, and in cases like the Grisbadarna treaties, to an actual lateral boundary." (Tr., pgs. 1005-1006)

With regard to the present controversy, wherein the Supreme Court has already established that Congress intended a middle line, and not a thalweg, for the River portion of the boundary, Mr. Young rightly observed that such intent should be followed

into the Gulf (Tr., pages 1005-1007).

Thus, while lateral boundaries through the territorial sea may have been less focused upon by the law of 1845/49 than now, it is evident from the methods used delimiting boundaries in lakes, rivers, bays, and straits that the middle line principle (direct lineal ancestor of the Geneva Convention's median line) would have been recognized at that time as the proper method of boundary delimitation in territorial waters.

C. Prescription and Acquiescence Has Not Operated to Alter the Historic Lateral Boundary Between Texas and Louisiana.

Insofar as boundaries between states are concerned, this Court consistently has required extremely clear and continuous substantial actions (or inactions) over very substantial time periods before it has been willing to entertain or sustain pleas of boundary alteration on the basis of acquiescence or prescription. See Arkansas v. Tennessee, supra, holding against Tennessee, which claimed a boundary based upon 120 years of alleged acquiescence; Louisiana v. Mississippi, 202 U.S. 1 (1906), sustaining Louisiana in the claim of acquiescence of 94 years by Mississippi, of a land boundary; Virginia v. Tennessee, 148 U.S. 503 (1893), sustaining Tennessee in their claim that Virginia had for 90 years acquiesced in land boundary; and Oklahoma v. Texas, 272 U.S. 21 (1926), wherein the court failed to sustain a plea of acquiescence based upon 24 years, after noting that the period was shorter than any ever sustained by the court.

It is clear from the cases that the time involved must generally be a great deal longer when dealing with a purely water boundary, as opposed to a boundary on land. The reason for the distinction apparently is that when dealing with a land boundary there are a great many more indicia of ownership and jurisdiction than a purely water boundary. Thus, in Virginia v. Tennessee, supra, the court was concerned with disputed land between Virginia and Tennessee and found it to be a part of Tennessee since both states had exercised political jurisdiction up to the line claimed by Tennessee, both states levied taxes on their respective sides up to the line claimed by Tennessee, both states granted franchises to people resident thereon up to the line as claimed by Tennessee, voting was determined by the line as claimed by Tennessee, state courts regularly exercised jurisdiction on the respective sides as claimed by Tennessee, congressional districts were determined with reference to the line as claimed by Tennessee, and the natural sentiments and affections of the residents of the area were as claimed by Tennessee. The alleged period of acquiescence was 90 years.

The Master concluded, without evidentiary support, that Texas and Louisiana have acquiesced in a lateral boundary through the middle of the jetties. (Special Master's Report, page 14.)

None of the parties in the hearing or in briefs filed with the Master relied on acquiescence as a method of transporting the boundary between Texas and Louisiana to the ends of the jetties. The United States has not argued acquiescence. Louisiana in

the hearing and in its post-trial brief (Pages 76-82) argued only that it has not acquiesced in Texas ownership of the entire area within the jetties. In fact, on Page 82 of its post-trial brief, Louisiana admits that Texas has not acquiesced in a boundary between Texas and Louisiana.

> "This discussion on acquiescence is to demonstrate to the court that neither side is able to establish that a lateral boundary between Texas and Louisiana in the Gulf had been fixed by one of the states as a definite line recognized by the other state over a long period of time. The Master has already considered in his prior report the various elements necessary to establish a boundary between two states by acquiescence. These factors do not exist to this portion of the boundary between Texas and Louisiana."[19] (Emphasis added)

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[19]The discussion of acquiescence referred to in the above indented quote is entitled by Louisiana as follows: "There has been no Acquiescence by Louisiana as to Texas' Claimed lateral boundary in the Gulf of Mexico." As the court will note, the discussion cites affidavits introduced by Louisiana claiming that Louisiana has enforced its fishing laws in the east half of the area within the jetties. It also attempts to refute Texas' affidavits introduced showing that Texas has enforced its laws in the entire area within the jetties. There is no doubt but that Louisiana has admitted that Texas has not acquiesced in the boundary running through the middle of the jetties.

In disposing of one of the most important issues in this case (whether or not the jetties shall be used in determining the lateral offshore boundary), in a single paragraph (Special Master's Report, Page 14), the Special Master states only that "on most of the maps introduced into evidence by both states the geographic middle of the jetties is designated as the boundary line between the states of Texas and Louisiana," and that "there is considerable evidence that these two states have recognized the geographic middle of the jetties as their boundary in the enforcement of fishing and wildlife laws."

Many maps were introduced as exhibits before the Special Master during the long history of this case. The Master does not favor the Court or the parties with a designation of the maps relied on to support his conclusion. The conclusion of the Master simply is not supported by the record. None of the maps constructed or drawn by agencies of the State of Texas show the boundary to extend through the jetties. To the contrary, Texas drawn and constructed maps uniformly show the boundary between Texas and Louisiana to extend only to the natural mouth of the river. Louisiana's Exhibit VVV contains a list of several maps showing the boundary to extend through the jetties. Notably, none of these maps were prepared by agencies of the State of Texas. A greater number of maps, including several prepared at various times by agencies of the State of Louisiana and the United States, extend the boundary only to the natural mouth of the river. See, e.g., Tx. Exh. F, Items 9, 10, 29; Tx. Exh. A, Items 1, 2, 3, 5, 8, 49, which show the boundary to extend only to the natural mouth of the

river. Texas' Exhibit F, Item 37, prepared by the Texas Highway Department in 1970, shows that Texas mapmakers agreed with mapmakers from Louisiana and the United States that no boundary existed between Texas and Louisiana in the jetties. Thus, while there may be a few maps extending the boundary through the jetties (none of which were prepared by Texas agencies) it is simply not true that "most" of the maps extend the boundary through the jetties.

The Master also erred in his conclusion that the states have recognized the geographic middle of the jetties as their boundary in the enforcement of fish and wildlife laws. Louis M. Morris, Martin Verboon, Robert LeBlanc, and A. A. DeLee, each of whom are long time residents of this area, testified by affidavit that Texas uniformly has enforced its fishing laws in the entire area within the jetties. (See Tx. Exh. III, OOO, PPP and QQQ.) Morris, a former director of enforcement of the Jefferson County Office of Parks and Wildlife Division, testified that the Parks and Wildlife Department has for many years annually issued a hardbound handbook containing the rules and regulations and statutory authority and responsibility of the Department to be utilized by Department employees in the enforcement of Texas game and fish laws. This publication states that it is the responsibility of the Parks and Wildlife Division to enforce Texas fish and game laws to the Texas statutory line, which lies East of the jetties. Indeed Morris testified that the Texas Department of Parks and Wildlife enforced the game and fishing laws of Texas in the entire area of the jetties.

The Texas Statutory line, enacted in 1947 by the Texas Legislature, Article 5415A, Vernon's Texas Civil Statutes, is further evidence that Texas never acquiesced in its lateral boundary with Louisiana extending through the jetties. Whether that boundary has any other legal effect, its enactment forcefully demonstrates a lack of acquiescence which is amplified by the fact that Texas leased mineral rights in the area east of the middle of the jetties. (See Tx. Exh. HHH.)

In fact, the problems resulting from overlapping leases in the area off the natural mouth of the river resulted in the so-called "administrative line", agreed to by the United States and Texas as a temporary convenience in offshore leasing. Clearly, the administrative line was never intended to fix the boundary between Texas and Louisiana. The United States Department of Interior maps showing that line bear the notation:

> "The east boundary of this area as shown hereon has been adopted administratively as the limiting boundary of the leasing blocks; it is not to be construed as being an extension of the boundary between the states of Texas and Louisiana."

The United States does not contend that by agreeing to the "administrative line," Texas has in any way conceded it to be the actual and lawful boundary between the United States and Texas.

So far as police jurisdiction is concerned, the evidence shows that the State of Texas has regularly

exercised its police jurisdiction in the area between the jetties, and that Louisiana residents from time to time arrested in the area east of the jetties have pleaded guilty to charges of fishing without a Texas permit, in the Texas courts. (See deposition of Louis M. Morris, Tx. Exh. III-1, OOO, PPP & QQQ.)

Moreover, as discussed earlier, maps drawn by Texas agencies have uniformly ended the boundary between Texas and Louisiana at the natural mouth of the Sabine River. This is also the case with respect to numerous maps drawn and constructed by various Louisiana agencies, many of whom were on conjunction with agencies of the federal government. (See Tx. Exh. A and F.) While some maps constructed by federal agencies show the boundary to extend to the end of the jetties, Texas has never acquiesced in this boundary; to the contrary, Texas, by its every action, has denied the existence of a boundary through the geographical middle of the jetties.

Clearly, none of the elements of acquiescence outlined by the Court have been shown to be controlling in the case of this seaward boundary, between the jetties or otherwise.

II.

THE SPECIAL MASTER ERRED IN HOLDING THAT THE LATERAL OFFSHORE BOUNDARY TO BE CONSTRUCTED BETWEEN THE STATES OF TEXAS AND LOUISIANA IS TO BE DETERMINED SOLELY BY AVULSIVE, MAN-MADE ADDITIONS TO THE SHORELINE.

As stated above, the primary issue the Master sought to resolve was whether the Geneva Convention applied to this boundary dispute. Setting aside for the moment the incorrectness of this premise, we now turn to his erroneous conclusion that the Geneva Convention applies and the result of his misapplication of the Convention.

A. The Provisions of the Geneva Convention are not Applicable to this Boundary Dispute Between Texas and Louisiana.

Texas does not dispute nor disagree with the propriety of this Court using the Geneva Convention to interpret those portions of the Submerged Lands Act which Congress intentionally left to the Court's interpretation when considering controversies under that Act.[20] However, this case is not a controversy arising pursuant to the Submerged Lands Act. It is simply a domestic boundary dispute between two states. The Special Master recognized that the Submerged Lands Act in no way affected lateral (or historical) boundaries of any coastal states (Special Master's Report, page 23). Nor have cases decided pursuant to the Submerged Lands Act affected the lateral offshore boundaries of adjoining coastal states. (See Texas Post-Trial Brief, pages 32 to 34.) The fact that this Court has decided to use the Geneva Convention where necessary to give effect to the provisions of the Submerged Lands Act does not per se transpose the legal basis for its use in those cases to boundary controversies unconnected with Submerged Lands Act grants.

[20] U.S. v. California, 381 U.S. 139, 150-160 (1965).

Also, the Master's determination that the Convention is applicable to future limitations of the Submerged Lands Act grants for Texas is at best only superficially correct. Future limitations of the Texas Submerged Lands grant governed by the Geneva Convention definition of coastline is only one element of such limitation. In measuring the Texas grant from either the 1845/49 shoreline or the modern, ambulatory shoreline, Texas does not and cannot use the west jetty. As succinctly stated by this Court in U.S. v. Louisiana:

> "It is true that last Term's decision that the three-league belt should be measured from the 1845 coastline and not from the edge of subsequently constructed jetties deprive Texas of the benefit of post-1845 accretion. It is also true that the use of the modern, ambulatory coastline as the baseline from which the limitation is measured will penalize Texas for post-1845 erosion . . ." 394 U.S. at page 5.

While the Texas coastline for measuring the Section 2(b) grant limitation may follow the Convention definition of ambulatory, it does not follow the Convention with regard to the utilization of the west jetty. Clearly the limitation based on the 1845/49 coastline has no relation to the Convention.

Texas believes that perhaps the main reason for the Master's conclusion that the Geneva Convention should apply lies in his statement at page 24:

> "Crucial to the disposition of the instant dispute, however, is the deter-

> mination of the coastline to be employed in the construction of the lateral boundary between Texas and Louisiana."

The "crucial" nature of the coastline really is whether the jetties should be used in constructing the lateral boundary. By finding that the same principle of the Geneva Convention has defined coastlines for Texas and Louisiana, the Master seeks to resolve the dispute concerning the use of the jetties by using this Geneva Convention defined coastline. However, as set out above, the Geneva Convention does not totally define the Texas coastline for the Submerged Lands Act grant purposes and where it is relevant, it is only partially applied since Texas does not use the west jetty. The Geneva Convention as applied to Texas and Louisiana for the Submerged Lands Act purposes in defining coastlines does not resolve the dispute as to whether both jetties should be included or disregarded as part of the coastline in constructing the lateral boundary.

B. Proper Application of the Geneva Convention Article 12, Compels the Conclusion that the Jetties Have No Role in Defining the Lateral Boundary.

Regardless of whether the use of the Geneva Convention is legally required or even desirable, application of the provision relevant to lateral offshore boundaries results in a clearly inequitable result and requires disregard of the jetties in constructing the lateral boundary between Texas and Louisiana.

Article 12 of the Geneva Convention provides that where two adjacent states are unable to agree on a lateral boundary, that in the absence of special circumstances, neither state may extend its boundary beyond a point which is at all points equidistant from the nearest point on the baselines used by the respective states to measure the breadth of their territorial sea. To apply Article 12 then requires substitution of the offshore area over which Texas and Louisiana exercise certain jurisdiction or ownership rights for the term "territorial sea". The breadth of Louisiana's grant of offshore jurisdiction or ownership rights is measured from the modern, ambulatory coastline as defined by the Convention including the use of the east jetty. 409 U.S. 17 (1972). This extends for three geographic miles. As discussed in (A), supra, measurement of the breadth of Texas' grant of offshore jurisdiction or ownership rights is made both from the historic 1845/49 coastline (minus the west jetty) and from the modern, ambulatory coastline with the exception that the west jetty is not utilized. There are then two baselines or coastlines by which Texas measures her offshore jurisdiction. Without attempting to resolve the question of which coastline would be used under the Convention, it is unquestioned that utilization of either excludes measurement by Texas from the west jetty. Application of the Convention literally or by analogy then results in the use of the east jetty but not the west jetty in constructing the median line--clearly an inequitable result.

This conclusion is strongly supported by the evidence produced at trial. As conceded by Dr.

Hodgson (Tr., page 647-657) a literal application of Article 12 to Texas and Louisiana would result in a closing line being drawn from the tip of the east jetty to the west bank of the Sabine as it existed in 1845/49, and a median line being constructed with its ending point being the midpoint of that closing line. Dr. Hodgson conceded that the median line would in all probability swing so far westward that it would again intersect the Texas coast, and conceded that such a line would be inequitable. The Special Master remarked that "we all agree that that would be an inequitable line." (Tr., page 958.)

Hodgson further conceded that in literally applying Article 12 to this situation, the inequity created by including the east jetty as part of the coastline, would require consideration of the east jetty as a "special circumstance", and that the accepted procedure under the Convention would then be to disregard the feature (the east jetty) which created this special circumstance, and draw a median line based upon the shorelines of both states, excluding both jetties. (Tr., pages 647-657.) This, of course, is the position that Texas has taken from the beginning, as evidenced by Texas Exhibit "DDD".

Richard Young, called as a witness by Texas, agreed with Dr. Hodgson's admission that a literal application of Article 12, as between Texas and Louisiana, would result in an inequitable line. He agreed that the solution to that inequity, under the Convention, would be to regard the east jetty as a "special circumstance", to then disregard it, and to construct a median line based upon the shorelines of both states, excluding both jetties. (Tr., page 955,

see also Tr., page 974.) Mr. Young also correctly stated that in view of the fact that the median line constructed on the present Louisiana and Texas shorelines of the two states would be at least three miles to the east of the tip of the east jetty, that the use of both jetties, would create an inequity, sufficient to require regarding both jetties as a "special circumstance" necessitating that they both be disregarded, and median lines be constructed from the shorelines excluding the jetties, as depicted on Texas Exhibit "DDD". (Tr., pages 980-981.)

Aaron Shalowitz, in his capacity as Special Assistant to the Director of the United States Coast & Geodetic Survey, viewed the existence of the jetties as a special circumstance, dictating that a median line be drawn from the historic shorelines of the two states. Shalowitz reasoned that such a line would have existed in contemplation of law long prior to the building of the jetties, and in any event, that the jetties would form a special circumstance which would preclude their use as part of the "baselines" for calculating the proper median line. (Tx. Exh. "YYY", pages 16-17, Shalowitz Memorandum.)

Dr. Lewis Alexander, the eminently qualified Chairman of the Department of Geography at the University of Rhode Island, testified by affidavit that the jetties should not be used in a coastline of this sort, and that a median line constructed on the shorelines, excluding the jetties, would be the appropriate lateral boundary. (Alexander Affidavit, Tx. Exh. "LLL"; Alexander Deposition, Tx. Exh. "LLL-1")

However, the Master chose to reject the interpretations of the application of Article 12 by admittedly qualified experts in the field of boundary and international law, Dr. Hodgson, Mr. Young, Dr. Alexander, and Mr. Shalowitz, and conclude that application of Article 12 does not result in the use of one jetty and not the other. (Special Master's Report, pages 44-45.) He further rejected the opinion of these experts that use of one jetty and not the other results in a special curcumstance which should be handled by disregarding both jetties in constructing the median line. The Master cites no law, no evidence, and no testimony which would compel the use of the jetties in a special circumstance situation rather than disregarding them.[21] He merely states:

> "To the extent the jetties are special circumstances in this case, they are to be included rather than ignored." (Special Master's Report, page 45.)

Texas submits that the expert testimony which is the best available interpretation of the special circumstances of the instant case compels the rejec-

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[21]The Special Master does cite the agreement between the United States and Florida to consider the jetties as part of the coast in United States v. Florida, No. 52 Original, as giving "support to the recommendation herein contained that justice and equity will be best served" by using the jetties in the instant controversy. (Special Master's Report, page 31.) However, Texas submits, that this is no support for the Master's position in light of the law and record of this litigation.

tion of both jetties in constructing the median line, lateral boundary in issue.

The Special Master, although holding that under the Geneva Convention the jetties are special circumstances as referred to in Article 12, has done no more than say the Geneva Convention does not resolve this boundary dispute other than to require the use of a median line gulfward of the end of the jetties[22]--a choice of line construction no longer actually disputed by the parties to this litigation. He has attempted to clothe his feeling that "equity" demands the use of both jetties with some legal basis. In fact, he has done no more than conclude that the boundary between Texas and Louisiana should be based on an avulsive addition to the shoreline of both states, the jetties. We now turn to our final discussion showing the impropriety of such method of resolving a boundary dispute.

C. Avulsive Additions to a Shoreline Such As Jetties Do Not Affect a Lateral Boundary.

The various documents defining and confirming the area and extent of Texas' and Louisiana's offshore lands all specify that such territory is bounded on the east by a line beginning at the mouth of the Sabine River.[23]

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[22]In fact, Article 12 authorizes the use of some method other than a median line to construct a lateral offshore boundary where special circumstances exist.

[23]See discussion, Point I.

Thus, whether the lateral boundary is viewed as having existed in contemplation of law since Texas' admission to the Union (an "inchoate" boundary), or whether some other view of that lateral extension is accepted, it is abundantly clear that the departure point for that lateral boundary has always been the "mouth" of the Sabine River. That mouth can no more be displaced seaward by the admittedly avulsive and unilateral action of the Corps of Engineers than it could be displaced east or west by avulsive changes in the course of the river. While the Master states that it "could be found" that the jetties have transported the mouth of the Sabine River to their gulfward terminus, (Special Master's Report, page 15), he, wisely, we believe, refrains from so holding.[24] Even Dr. Hodgson conceded that the action of the Corps in building the jetties was avulsive in nature. (Tr., pages 622-623.)

Our case law has consistently held, as stated at the outset of this brief, that no change of boundary results from avulsive changes in a river, whether caused by natural or artificial means.

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[24] However, the Master does state that, while the 1836 Boundary Act of the Republic of Texas contains no specific lateral boundary description, such absence is only "from the mouth of the Sabine Gulfward" (Special Master's Report, page 37.) This statement implicitly recognizes that at the very least the beginning point for the offshore lateral boundary is obviously contained in the historical documents regarding the boundary between two states. Yet the Master continued to reject any reliance on such documents for direction.

Nebraska v. Iowa, supra; Washington v. Oregon, supra; Arkansas v. Tennessee, supra; Minnesota v. Wisconsin, supra; Durfee v. Duke, supra; James v. State, 72 S.E. 600 (C.A. Georgia, 1911); Whiteside v. Norton, 205 F. 5 (8th Cir. 1913), cert. denied 232 U.S. 726 (1913); Stowe v. United States, 71 F.2d 826 (8th Cir. 1932).

An avulsive change can result from either natural or artificial actions. Examples of artificial avulsive changes include the diversion of the main channel of the Savannah River from the South Carolina side of the river to the Georgia side by the building of a series of dikes by the United States government for the purpose of improving navigation. James v. State, supra. An avulsive change occurred in the St. Louis River by the dredging of a channel in that river by the United States government to improve navigation which had the effect of changing the main navigable channel. Whiteside v. Norton, supra; Minnesota v. Wisconsin, supra. The courts have consistently held in these cases that where the dredging of channels or building of dikes for navigational improvement by the United States government has occurred, a boundary change is not effected since these changes are avulsive in nature.

In James v. State, supra, the building of the dikes changed the main navigable channel of the river. However, the court held that the boundary between South Carolina and Georgia was fixed at the current or main thread of the channel of the Savannah River by the Treaty of Bufort in 1878. Subsequent changing of the main channel through avulsive means could not alter the boundary between the two states.

The alteration in the main navigable channel caused by dredging of a deeper channel by the United States government in the St. Louis River was also held not to affect the boundary between the state of Minnesota and Wisconsin. As stated by the Eighth Circuit in Whiteside v. Norton, supra, and by the Supreme Court in Minnesota v. Wisconsin, supra, the boundary line between the states must be ascertained upon a consideration of the situation existing at the time the states entered the union and that the main channel at that time would be the boundary, regardless of navigational improvements altering the present location of the main navigational channel.

Given the controlling law of this nation, the jetties, avulsive additions to the shorelines of Texas and Louisiana have no effect on and no place in the determination of the lateral offshore boundary between the two states.

CONCLUSION

For the foregoing reasons, the State of Texas prays that the Report of the Special Master be in all things adopted and approved as the judgment of the Court, except for a determination that the lateral boundary in the Gulf of Mexico between the States of Texas and Louisiana and between the State of Texas and the United States of America be established as a median line, based upon the historic 1845/49 shoreline of the States of Texas and Louisiana.

Respectfully submitted,

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May 1975

CERTIFICATE OF SERVICE

I, Elizabeth Levatino, First Special Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28 day of May, 1975, I served copies of the foregoing Acceptance of the State of Texas To The Report of the Special Master With Two Exceptions, by transmitting conformed copies of the same by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Louisiana, and upon the Solicitor General of the United States, and also upon the City of Port Arthur, Texas, through its City Attorney.

Elizabeth Levatino

ELIZABETH LEVATINO